



February 24, 1999

Ms. Mary D. Marquez
Capital Metro Transportation
Authority
2910 East 5th Street
Austin, Texas 78702

OR99-0543

Dear Ms. Marquez:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code, (the Act). Your request was assigned ID# 121314.

Capital Metropolitan Transportation Authority (“Capital Metro”) received a written request for information for eleven categories of information related to software developed by UMA Systems, Inc. (“UMA”). This software now belongs to and is maintained by Trapeze Software, Inc. (“Trapeze”).¹ The requested information includes the following: source and object codes, user manuals, requests for proposals and responses to these requests, evaluations, correspondence with Trapeze, T/Plus, UMA, and Constellation, internal memoranda, files, transcripts, and records retention policies. On January 20, 1999, based on a revision to the original request for information, Capital Metro amended its request for an opinion to exclude information that was less than five years old.

Pursuant to section 552.305(a) of the Government Code, a governmental body may decline to release information for the purpose of requesting an attorney general’s decision when a person’s property interests may be involved. Capital Metro raises no exceptions to

¹Trapeze states, “Initially, the transit software was developed by T/Plus. Later, it was sold to UMA and subsequently assigned to Trapeze.” Letter from Anne Thomas, Deeth Williams Wall, to Dan Morales, Attorney General, Texas (Dec. 29, 1998).

disclosure on its own behalf. Capitol Metro has submitted the requested information to this office about which it seeks a ruling. Since the property and privacy rights of third parties may be implicated by the release of the requested information, this office notified UMA and Trapeze about the request for information. See Gov't Code § 552.305 (permitting interested third party to submit to the attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). This office has received a response from Trapeze that states, "We understand that UMA will be adopting and relying on this submission." Because UMA assigned the software to Trapeze, we recognize that Trapeze's interest in protecting the requested information from disclosure includes information delivered by UMA to Capital Metro. We have considered the exceptions claimed by Trapeze and have reviewed the documents at issue.

Trapeze argues that section 552.104 of the Government Code excepts the requested information from disclosure. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). Because Capital Metro does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). The requested information may not be withheld under section 552.104.

Trapeze also raises section 552.110 as an exception to disclosure of the requested information. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of

specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).²

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts’ interpretation of exemption four to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption four to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government’s ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 at 4 (1996). To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

The documents Capital Metro submitted to this office are not numbered; however, Trapeze submitted to this office a chart of numbered documents and argues that documents 2-5, 9-10, 13, 31, 33-35, 37, 38-52, 54-64, 79-90, 92-99, 102-132, and 138 are exempt from disclosure under section 552.110 of the Government Code. Trapeze has met its burden under section 552.110 for some information, but not other information. The CD-Rom (item 52 on Schedule “A”) contains information protected from disclosure as a trade secret and must not

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company’s] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

be released. The cassette tape of a pre-proposal meeting at which Capital Metro officials responded to questions from potential suppliers (item 51 on Schedule "A") is likewise not protected and must be released. Portions of UMA's proposal, technical specifications, and evaluations are protected as confidential commercial or financial information. We have marked the information that must be withheld from disclosure. All of the information that is not marked must be released.

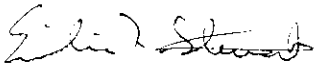
Among the documents that must be released is the contract between UMA and Capital Metro. Trapeze claims protection for the entire contract as both a trade secret and confidential commercial or financial information under section 552.110. We do not believe that its arguments for withholding the contract under the trade secret prong of section 552.110, however, sufficiently address why specific portions of the contract should be considered trade secrets. We note the observation in Open Records Decision No. 514 (1988) that it is not "clear whether the general terms of a contract with a state agency could ever constitute a trade secret." *See* Gov't Code §552.022(3) (information in a government contract is public "if the information is not otherwise made confidential by law"). The contract appears to relate to a "single or ephemeral events in the conduct of the business" not "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 (quoted above). Since in our opinion, Trapeze has not made a *prima facie* showing that any portions of the contract are "trade secrets," we conclude that the contract may not be withheld under the "trade secret" prong of section 552.110.

We note specifically with regard to Trapeze's claim that pricing information in the contract is protected commercial or financial information, that federal cases applying the FOIA exemption four have required a balancing of the public interest in disclosure with the competitive injury to the company in question. *See* Open Records Decision No. 494 at 6 (1988); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). The public has an interest in knowing the prices that a government contractor charges. Similarly, Trapeze's allegations that release of technical information in the contract would harm it do not, in our opinion, offset the public's interest in knowing the details of what goods and services the governmental body has acquired with public funds. The public interest in disclosure of the contract outweighs the harm that Trapeze has shown it would suffer by release of the information. Consequently, the contract at issue must be released and any part of the proposal that appears in the contract must also be released.

In summary, we have marked the information in the submitted documents that may be withheld. All other information must be released. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is

limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Emilie F. Stewart
Assistant Attorney General
Open Records Division

EFS\nc

Ref: ID# 121314

Enclosures: Marked documents

cc: Mr. John O'Sullivan
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(w/o enclosures)